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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

Case No. 2:16-CR-328 JCM (GWF)

8 Plaintiff(s),

ORDER

9 v.

10 BENYIAHIA HEBBAR,

11 Defendant(s).
12

13 Presently before the court is Magistrate Judge Foley's report and recommendation
14 ("R&R"). (ECF No. 93). The government filed an objection to the R&R (ECF No. 101), to which
15 the defendant replied (ECF No. 105).

16 **I. Legal Standard**

17 This court "may accept, reject, or modify, in whole or in part, the findings or
18 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Where a party timely objects
19 to a magistrate judge's report and recommendation, then the court is required to "make a de novo
20 determination of those portions of the [report and recommendation] to which objection is made."
21 28 U.S.C. § 636(b)(1).

22 **II. Discussion**

23 The FBI conducted an investigation of defendant from May to August 2016 in regard to
24 several home invasion robberies he was allegedly planning. (ECF No. 93). The investigation
25 included the use of three confidential sources ("CS-1, CS-2, and CS-3"). *Id.* CS-1 introduced
26 defendant to CS-2, but contact between defendant and CS-2 ceased after a short period of time.
27 *Id.* CS-1 also introduced defendant to CS-3 in June 2016. *Id.* Shortly after making the
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1 introduction, CS-1 left the jurisdiction and was no longer involved in the investigation, but
2 defendant and CS-3 maintained contact. *Id.*

3 On August 4, 2016, defendant met with CS-3. (ECF No. 101). CS-3 recorded the meeting.
4 *Id.* During the meeting, defendant allegedly asked CS-3 to get him a gun for a robbery, specifically
5 stating he wanted an UZI or AK-47. *Id.* On August 11, 2016, CS-3 again met with defendant and
6 recorded the meeting. *Id.* CS-3 showed defendant photos of a fully automatic AR-15. *Id.*
7 Defendant told CS-3 that this was the type of gun he was looking for. *Id.* The government
8 contends that CS-3 specified that this was a fully automatic weapon. *Id.*

9 On August 12, 2016, defendant purchased the gun from CS-3. (ECF No. 101). This
10 meeting was also recorded. *Id.* After defendant had placed the gun in the trunk of his car and had
11 entered the driver's seat, defendant was arrested by the FBI. *Id.*

12 Defendant's interactions with CS-3 and subsequent purchase of the gun form the basis for
13 the indictment. (ECF Nos. 19, 93). On September 14, 2017, defendant pleaded guilty to
14 possession of an unregistered firearm in violation of 26 U.S.C. §§ 5812 and 5861(b). (ECF No.
15 57).

16 In the report and recommendation, Magistrate Judge Foley found that defendant's
17 arguments (1) that his attorney failed to properly represent him and bullied him into pleading guilty
18 and (2) that the prosecutor threatened to file additional charges against him if he did not plead
19 guilty, lacked merit and did not warrant withdrawal of defendant's plea. (ECF No. 55). However,
20 Magistrate Judge Foley did find that defendant's subsequent discovery of alleged misconduct by
21 a confidential source in an unrelated case provided a fair and just reason for the defendant to
22 withdraw his guilty plea. (ECF No. 55). Accordingly, Magistrate Judge Foley recommends that
23 the court grant the defendant's motion to withdraw his guilty plea. *Id.* The government objects to
24 Magistrate Judge Foley's finding that the confidential source's misconduct provided a fair and just
25 reason for withdrawal and asks the court to reject the report and recommendation. (ECF No. 101).

26 "Federal Rule of Criminal Procedure 11(d)(2)(B) provides that a defendant may withdraw
27 a plea of guilty prior to the imposition of sentence if he can show a fair and just reason for
28 requesting the withdrawal." *United States v. McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008)

1 (quoting *United States v. Hyde*, 520 U.S. 670, 676-77 (1997)). “The defendant is not permitted to
2 withdraw his guilty plea simply on a lark.” *Id.* “In this Circuit, fair and just reasons for withdrawal
3 include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances
4 or any other reason for withdrawing the plea that did not exist when the defendant entered his
5 plea.” *Id.* However, allowing a defendant “to withdraw his guilty plea merely because he changed
6 his mind would undermine Rule 11’s purpose and reduce plea proceedings to a time-consuming
7 formality with no lasting effect.” *United States v. Rios-Ortiz*, 830 F.2d 1067, 1070 (9th Cir. 1987).
8 A court should consider several factors when determining whether withdrawal of a guilty plea is
9 warranted, including: “[w]hether the movant has asserted his legal innocence,” and “[t]he amount
10 of time which has passed between the plea and the motion.” *McTiernan*, 546 F.3d at 1167 (quoting
11 FED. R. CRIM. P. 32 advisory committee note). “The defendant bears the burden of establishing
12 that withdrawal is warranted. *Id.* at 1166-67.

13 In *McTiernan*, the court held that ineffective legal advice regarding the viability of pretrial
14 motions could warrant withdrawal of a guilty plea. 546 F.3d at 1167. In that case, the defendant
15 pleaded guilty but then sought to withdraw his plea, claiming his attorney failed to advise him he
16 could file a pretrial motion to suppress. *Id.* at 1165, 1167-68. The court found that proper legal
17 advice about the pretrial motion, based on the facts known to counsel at the time of the plea, “could
18 have at least plausibly motivated a reasonable person in [defendant’s] position not to have pled
19 guilty[.]” *Id.* at 1168.

20 Additionally, a defendant can seek to withdraw his guilty plea on the basis of newly
21 discovered evidence. *United States v. Garcia*, 401 F.3d 1008, 1011-12 (9th Cir. 2005). A
22 defendant need not show that the newly discovered evidence exonerates him or would reasonably
23 lead to an acquittal at trial, but “newly discovered evidence wholly unrelated to a defendant’s case
24 would surely not entitle him to withdraw his guilty plea[.]” *Garcia*, 401 F.3d at 1011.

25 A defendant carries the burden to show that the evidence is “new” and relates to his “factual
26 guilt or innocence.” *United States v. Bryant*, 557 F.3d 489, 495 (7th Cir. 2009) (citing *Garcia*,
27 401 F.3d at 1011-12). In *Garcia*, the court found that a declaration from a witness discovered
28 subsequent to the defendant’s guilty plea was a ‘fair and just’ reason to withdraw. 401 F.3d at

1 1013. The newly discovered witness’s declaration directly contradicted part of a prior witness’s
2 statement incriminating the defendant, “thus rais[ing] new questions about [the defendant’s]
3 involvement in the illegal activity[.]” *Id.* at 1011.

4 Here, months after defendant pleaded guilty, “a defendant in a wholly unrelated criminal
5 case made allegations that CS-1 acted improperly *in that case*.” (ECF No 79). These subsequent
6 allegations of misconduct against CS-1 formed the basis for Magistrate Judge Foley’s
7 recommendation that defendant be able to withdraw his guilty plea. (ECF No. 93).

8 The government objects to Magistrate Judge Foley’s finding, arguing that the allegations
9 against CS-1 do not represent a ‘fair and just’ reason for granting withdrawal of defendant’s plea.
10 (ECF No. 101). The court agrees.

11 While the court is not to determine whether an asserted legal defense or newly discovered
12 evidence would ultimately exonerate the defendant, the defendant bears the burden of showing
13 that the newly discovered evidence raises questions as to his guilt. *See Garcia* 401 F.3d at 1111;
14 *Bryant*, 557 F.3d at 495.

15 Here, the court does not find that the ‘newly discovered’ evidence defendant references in
16 his motion to withdraw plea—allegations of misconduct against CS-1 in a wholly unrelated case—
17 are sufficiently connected to defendant’s guilt or innocent to warrant withdrawal of his plea. *See*
18 *Garcia* 401 F.3d at 1111; *Bryant*, 557 F.3d at 495. The court agrees with the government that the
19 standard espoused by the court in *McTiernan* related to ineffective assistance of counsel, and not
20 newly discovered evidence, as is the case here. (ECF No. 101). Nonetheless, even if known at
21 the time of his guilty plea, the court finds that CS-1’s alleged misconduct would not have plausibly
22 persuaded a reasonable person in defendant’s position to change his plea. *See McTiernan*, 546
23 F.3d at 1168.

24 CS-1 did not participate in the meetings regarding the automatic firearm or its actual sale,
25 the conduct for which defendant pleaded guilty. CS-1’s only involvement was introducing
26 defendant to CS-3. In fact, CS-1 had left the district before defendant inquired about purchasing
27 a gun from CS-3. Unlike in *Garcia* where the newly discovered evidence directly contradicted a
28 prior witness’s statement incriminating the defendant, here the court is unconvinced that CS-1’s

1 alleged misconduct in a wholly separate case has any bearing on defendant's guilt or innocence as
2 to the possession of an unregistered firearm charge.

3 Even if CS-1 is found to have committed misconduct in the other case, it is unclear how, if
4 at all, such a finding would impact defendant's case. Had CS-1 been involved in the sale or the
5 preceding meetings, the court agrees that allegations of CS-1's impropriety in other cases would
6 be relevant. However, CS-1 had no involvement in the sale of the firearm—the crime defendant
7 pleaded guilty to. Accordingly, even assuming admissibility, use of CS-1's alleged misconduct
8 for impeachment purposes would prove ineffective. Further, every meeting CS-3 had with
9 defendant was recorded. Any doubt as CS-3's conduct or the content of their interactions can thus
10 easily be verified.

11 While the court agrees with Magistrate Judge Foley that the 'fair and just' standard is a
12 permissive standard, in order to meet that standard, a defendant seeking to withdraw his plea based
13 on newly discovered evidence must at least evince a basic nexus between the new evidence and
14 the offense for which he pleaded guilty. *See Garcia* 401 F.3d at 1111; *Bryant*, 557 F.3d at 495.
15 Such a nexus does not exist here. Because CS-1's alleged misconduct in another case does not
16 raise any questions as to the defendant's conduct in this case, the court will not elect to adopt
17 Magistrate Judge Foley's recommendation and thus will deny defendant's motion to withdraw
18 plea.

19 **III. Conclusion**

20 For the reasons stated in the R&R and as stated above, the court will adopt Magistrate
21 Judge Foley's recommendation denying defendant's arguments that (1) his attorney failed to
22 represent him and bullied him into pleading guilty and (2) that the government threatened to levy
23 more charges against him if he did not plead guilty. (ECF No. 93). However, the court will not
24 adopt Magistrate Judge Foley's finding that the subsequently discovered allegations against CS-1
25 in a separate case represented a 'fair and just' reason to withdraw defendant's plea. *Id.*
26 Accordingly, the court will deny defendant's motion to withdraw plea. (ECF No. 75).

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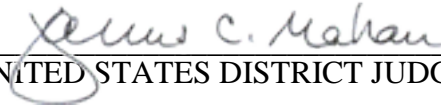
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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Magistrate Judge Foley’s report and recommendation (ECF No. 93) be, and the same hereby is, adopted in part and rejected in part consistent with the foregoing.

IT IS FURTHER ORDERED that defendant’s motion to withdraw plea (ECF No. 75) be, and the same hereby is, DENIED.

DATED June 19, 2018.


UNITED STATES DISTRICT JUDGE